IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.336 OF 2002

Dolphin Offshore Enterprises (I) Ltd. ... Petitioner (Orig.Claimant)

vs.

Oil and Natural Gas Corporation Ltd. .... Respondent.

Mr.D.D.Madan with Leon Samuel & Ms.Deepti Chand i/b. Advani & Co., for Petitioner.

Mr.D.R.Zaiwala with Pankaj Sawant, N.Dhruv & Prakash Shinde i/b. M.Dhruva & Co., for Respondent.

CORAM: D.K.DESHMUKH,J.

DATED: 20th September,2005

P.C.:-

1. By this petition filed under section 34 of the Arbitration and Conciliation Act, the petitioner challenges the Award dated 14.2.2002 made by the Arbitral Tribunal as also the order made by the Arbitral Tribunal dated 20.4.2002.

2. The facts that are relevant and material are that by

contract dated 10.11.1993, the petitioner agreed to operate and manage marine and diving services on board of the respondent's vessel “MSV Samudra Prabha”. In consideration for the said services provided by the petitioner, the respondent had agreed to reimburse the petitioner for the cost incurred by the petitioner upto the prescribed ceiling of Singapur dollars 13,20,000/- . The said ceiling limit included the cost of consumables and spares incurred by the petitioner. The said contract further provided that the petitioner should utilise the stocks of consumables and spares lying with the respondent on board of the said vessel. Subsequently, disputes arose between the parties. The disputes were referred to the Arbitral Tribunal. The Arbitral Tribunal has made the Award. The respondent-ONGC had challenged some part of the Award by filing Arbitration Petition no.195 of 2002. That petition is disposed of by me by order dated 19.9.2005. By the present petition, the petitioner challenges the same Award and the order subsequently made under Section 33 of the Arbitration and Conciliation Act 1996, by the Arbitral Tribunal in so far as it does not award 5% of service charges on the cost of material brought on board by the petitioner but left unconsumed. The petitioner also challenges the Award in so far as it does not award 7.3% of the cost of the items towards insurance, freight and handling charges in relation to the items which were brought on board by the petitioner and remained unconsumed. The petitioner also challenges

the Award in so far as the part of the claim of the petitioner for cost of the material brought on board but not consumed, which claim is rejected by the Arbitral Tribunal for lack of evidence. The petitioner also submits that though the Arbitral Tribunal has recorded the finding that the amount awarded to the petitioner as a cost of the material brought on board by the petitioner but which remained unconsumed is not to be calculated for the purpose of determining the ceiling for costs under the contract, but while calculating the costs the amount has been calculated contrary to the findings recorded by the Arbitral Tribunal.

3. So far as the first contention regarding 5% of service charges is concerned, I do not find any fault with the finding recorded by the Arbitral Tribunal because 5% service charges became payable under clause 8.6 of the contract and the service charges are payable only in relation to the spares and repairs performed on the vessel which were brought on board and actually consumed, and therefore, the Arbitral Tribunal has rightly rejected the claim made by the petitioner in relation to 5% service charges.

4. So far as the second contention regarding insurance, freight and handling charges payable at the rate of 7.3% of the cost of the items brought on board by the petitioner and left unconsumed is concerned, the Arbitral Tribunal has recorded the finding that 7.3% on

the average costs of the items towards the freight, insurance and handling charges in relation to the items which were brought on board and consumed would have been charged. But there is no evidence produced by the petitioner showing that the said expenses are actually incurred by the petitioner. I have been told that this finding recorded by the Arbitral tribunal that there is no evidence produced on record by the petitioner is wrong. But I have not been shown that evidence Therefore, I do not find any fault with the findings recorded by the arbitral tribunal in this regard.

5. So far as the point regarding cost of the goods purchased is concerned, the Arbitral Tribunal has held that for claiming price of the material which was brought on board by the petitioner for consumption but remained unconsumed and was taken away by the respondent, the petitioner has to produce primary evidence i.e. invoices showing actual price paid by the petitioner. As the petitioner did not produce original invoices, the petitioner is not entitled to any reimbursement. In my opinion, this being the finding of fact cannot be disturbed by this Court. In any case, I was not shown any evidence viz. the original invoices which were produced by the petitioner in support of its claim before the Arbitral Tribunal, though it was recorded in the minority Award that the evidence in support of the claim was tendered. However, since the goods were purchased by the petitioner,

the burden was entirely on the petitioner to prove it by producing documentary evidence.

6. So far as the last contention is concerned, the Arbitral Tribunal has recorded a clear finding that the cost of the material which remained unconsumed cannot be taken into consideration while computing the ceiling. The findings of the Arbitral Tribunal in this regard are found in the Award which read as under:

> "In our view therefore on the proper interpretation of the said clauses of the contract and in the context of things, for the purposes of determining the ceiling for costs under the contract only the costs of the consumables and spares actually consumed by the Claimants in discharge of their obligations under the contract during the period of the contract will have to be taken into consideration and not the cost of material procured by the Claimants and brought on board but remaining unconsumed at the conclusion of the contract."

This is a clear finding recorded by the Arbitral Tribunal. But, in my

opinion, as I have made it clear in the order passed in Arbitration Petition no.195 of 2002 that it requires modification in the final award, it is not necessary for me to make calculations in this order since the amounts which are liable to be paid and received are to be worked out in accordance with the findings recorded by the Arbitral Tribunal. In the result therefore, petition is disposed of. There shall be no order as to costs.